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No. 1127

In the Supreme Court of the United States

OCTOBER TERM, 1967

CHARLES FREDERICK ROCHA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1967. A timely petition for rehearing was denied on January 18, 1968. The petition for a writ of certiorari was filed on February 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the search of petitioner's service station was properly sustained as incident to a valid arrest based upon probable cause.

2. Whether the presumption of 21 U.S.C. 174, based upon unexplained possession of narcotics, is valid.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of concealing and facilitating the concealment of narcotics, in violation of 21 U.S.C. 174. He was sentenced to imprisonment for a period of ten years (1 R. 2-4, 58). The court of appeals affirmed.

Prior to trial petitioner moved to suppress as evidence heroin seized at his place of business, urging that the search was made under a state search warrant which the issuing magistrate had later declared invalid; that the complaint upon which the warrant was based was insufficient under both state and federal law; and that the narcotics had been turned over to federal officers in violation of state law (1 R. 8-9; 2 R. 2-3). The government, while contending that the affidavit for search warrant was sufficient, also urged that the search was incident to a valid arrest by state and federal officers based upon probable cause to believe that petitioner had committed a felony (2 R. 16-17).

On November 16, 1965, federal narcotics agent Aruslan, who was working in conjunction with local

officers, purchased an ounce of heroin from one Frank Ram in Santa Clara, California (2 R. 18-20). On November 18, Aruslan met again with Ram and arranged to buy an additional three ounces of heroin. Ram said that he would go to his source of supply, which was not far away. Ram was observed to leave Aruslan and follow a circuitous route, driving at different speeds, making a number of stops, and finally arriving at a Sunland service station in Santa Clara. There he met petitioner and conversed with him for a few minutes. He then returned to Aruslan and delivered the promised heroin (2 R. 20-23, 57-58).

On November 22, Ram again met Aruslan, and agreed to go to his source to get three more ounces of heroin. After proceeding in much the same fashion as on the 18th, Ram arrived at the Sunland station, where he conversed with petitioner. He then returned to Aruslan and delivered three ounces of heroin. At various times, Ram told Aruslan that his connection was of Mexican descent, a businessman in Santa Clara, and that he kept narcotics in the safe of a service station which he operated. It was learned from other sources that petitioner operated the service station where he had been seen talking with Ram (2 R. 23-26).

On November 23, Aruslan made another purchase of heroin from Ram and then arrested him. Ram said that he obtained his narcotics from petitioner and produced a business card with petitioner's name on it. Ram agreed to call petitioner and, after dialing the telephone number on the card, talked with someone whom he addressed as "Fred". Ram told this person

that he had completed the sale and that the buyer wanted to get some more. Aruslan, who listened to the conversation with Ram's consent, heard the person at the other end of the line say that he had only a couple of pieces left, which would have to last until he could make another trip. The other party also asked whether Ram had cut the stuff which he just got. At the time of this conversation, petitioner was observed by other officers talking on the telephone (2 R. 26-30).

A state warrant authorizing the search of the safe at the Sunland service station was obtained (1 R. 21-24; 2 R. 30).[1] State and federal officers went to the service station, placed petitioner under arrest, and removed two packages of heroin from the unlocked safe. The heroin was handed over to Aruslan (2 R. 30, 93-97). On February 3, 1966, the magistrate who issued the search warrant sustained petitioner's motion to quash it. His order, however, was "without prejudice to the People offering said evidence at any future hearing in this matter as being incident to a legal arrest" (1 R. 27).

The trial court denied the motion to suppress, both on the ground that the affidavit for the search warrant was sufficient and that the search was properly incident to a valid arrest based upon probable cause (2 R. 109-113). The court of appeals sustained the search as incident to arrest, finding it unnecessary to consider the adequacy of the affidavit for the search warrant.

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[1] The relevant portions of the affidavit are set forth in the Petition, pages 7-8.

ARGUMENT

1. The federal agents and state officer who arrested petitioner had more than adequate probable cause to arrest petitioner without a warrant. On several occasions, Ram filled orders for narcotics after making visits to petitioner. He also gave information concerning his "connection" which matched petitioner's location and occupation. The telephone call made after Ram's arrest, which agent Aruslan overheard with Ram's consent, clearly pointed to petitioner as Ram's source of narcotics. Thus, the asserted invalidity of the search warrant did not affect the propriety of a search which was incident to a valid arrest, based upon probable cause. *Margeson* v. *United States*, 361 F. 2d 327, 328 (C.A. 1); *Lawton* v. *Dacey*, 352 F. 2d 61 (C.A. 1); *United States* v. *Bozza*, 365 F. 2d 206, 224-225 (C.A. 2); *United States* v. *Hall*, 348 F. 2d 837, 841-842 (C.A. 2), certiorari denied, 382 U.S. 947; *United States* v. *Gearhart*, 326 F. 2d 412 (C.A. 4); *Dearinger* v. *United States*, 378 F. 2d 346, 347 (C.A. 9), certiorari denied, 389 U.S. 885; *Bell* v. *United States*, 371 F. 2d 35 (C.A. 9), certiorari denied, 386 U.S. 1040.[2]

2. The contention, made for the first time here, that the presumption of 21 U.S.C. 174, arising from possession of narcotics, violates the Fifth Amendment is without merit. *Yee Hem* v. *United States*, 268 U.S. 178; *Roviaro* v. *United States*, 353 U.S. 53, 63. Cf. *United States* v. *Gainey*, 380 U.S. 63.

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[2] The court of appeals properly held that this case involved no violation of state law by turning over the narcotics to a federal agent, as this was a joint state and federal search.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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